

Nos. 04-19-00192-CR & 04-19-00193-CR

JOHNNY JOE AVALOS,	§	IN THE FOURTH DISTRICT
<i>Appellant</i>	§	FILED IN
	§	4th COURT OF APPEALS
	§	SAN ANTONIO, TEXAS
v.	§	11/15/19 1:30:35 PM
	§	COURT OF APPEALS
	§	MICHAEL A. CRUZ
	§	Clerk
THE STATE OF TEXAS,	§	
<i>Appellee</i>	§	SAN ANTONIO, TEXAS

**JOINT MOTION TO ABATE APPEAL AND REMAND TO THE TRIAL
COURT TO MAKE FINDINGS ON THE QUESTION OF THE
APPELLANT'S INTELLECTUAL DISABILITY**

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

NOW COMES Joe D. Gonzales, Criminal District Attorney of Bexar County, Texas, and Andrew Warthen, counsels for the State of Texas, and appellant Johnny Joe Avalos, by and through his counsel, Jorge G. Aristotelidis, and, pursuant to Texas Rule of Appellate Procedure 44.4, file this joint motion to abate and remand.

I.

This case is on appeal from the 437th District Court of Bexar County, Texas. The style is *The State of Texas v. Johnny Joe Avalos*, and the trial-court cause numbers are 2018-CR-7068 and 2016-CR-10374, respectively. Oral arguments were heard by the Court on November 5, 2019.

During argument, the Court expressed concerns that the record was not properly developed, thereby undermining its ability to consider the merits of appellant's points of error. Specifically, the Court wondered whether if, because the

trial court never made an on-the-record factual determination that appellant is intellectually disabled, appellant lacked standing to advance an as-applied challenge to § 12.31(a)(2) of the Texas Penal Code; or, in light of the stipulation by the parties during oral argument that appellant is intellectually disabled,¹ it would thus be unnecessary to remand the matter for the trial court's factual finding on this issue. The panel appeared settled on the position that the matter of appellant's intellectual disability would not require a specific finding by the trial court or a remand for that purpose.

Neither party raised or briefed those issues, but counsels for the State and appellant have conferred since oral arguments were presented, and they agree that the more prudent course would be to abate this appeal and remand for a factual determination from the trial court on the question of appellant's intellectual disability.

¹ The appellate record contains exhibits by appellant—reports prepared and submitted to the trial court from two experts for the defense and two experts for the State—that established appellant as intellectually disabled.

II.

Texas Rule of Appellate Procedure 44.4 may provide this Court a vehicle to abate this appeal to make a finding whether appellant is intellectually disabled. Under Rule 44.4, if, among other things, (1) a trial court does not take an action, (2) the lack of an action by the trial court prevents proper presentation of a case to a court of appeals, and (3) the trial court can correct its lack of action, then the court of appeals cannot affirm, reverse, or dismiss an appeal. Tex. R. App. P. 44.4. Instead, the appellate court must remand the case to the trial court for it to take appropriate action. *Id.* After that, the appellate court proceeds with the appeal as though the trial court acted. *Id.*; see *Pacheco v. State*, 509 S.W.3d 443, 446 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (order).

Here, the trial court did not make a factual finding of whether appellant is intellectually disabled. The trial court can correct its inaction by holding a hearing and making such a finding. Accordingly, this Court should abate and remand before affirming, reversing, or dismissing this appeal.²

² This motion should not be taken as a general argument or concession that Rule 44.4 can be utilized to abate and remand whenever a party fails to preserve error or take the steps necessary to factually develop their issues. *Cf.* Tex. R. App. P. 33.1(a) (outlining the mandatory prerequisites to presenting an issue for appellate review). Instead, under the unique circumstances of this case, where the very foundation of the points of error turn on the answer to a specific question—whether appellant is intellectually disabled—which, based on the information available to the parties, they chose not to formally contest, resulting in them not seeking an on-the-record answer, Rule 44.4 may provide a vehicle to receive an answer to that question.

III.

At the hearing, the trial court can admit and consider the evidence from the record regarding whether appellant is intellectually disabled. The parties may even stipulate to that fact from this evidence. Of course, the trial court need not credit any particular evidence, nor is it bound by any stipulation by the parties. Accordingly, any understanding between the parties regarding that fact (or any stipulation that the State made at oral argument) is ultimately not dispositive of the question as it relates to the trial court's ultimate factual determination. That is to say, to ensure that the fact is firmly established by the record, this Court should abate and remand. The trial court may have denied appellant's motion to declare § 12.31(a)(2) unconstitutional because it determined that he was not intellectually disabled—that is, it made an implied finding against appellant. Or, it also may have denied his motion because it concluded that, even if he is intellectually disabled, the statute is nevertheless constitutional. It is unclear from the record what the trial court's reasoning was, which is even more reason to abate this appeal. *Cf. Henery v. State*, 364 S.W.3d 915 (Tex. Crim. App. 2012) (utilizing Rule 44.4 to abate and remand when the record was unclear about what action the trial court intended to take).

IV.

Counsels for the State and appellant pray that this Court grant this joint motion, abate this appeal, and remand to the trial court to make a factual finding on the record of whether appellant is intellectually disabled, after which time this Court may determine the merits of the appellate issues before it.

Respectfully submitted,

JOE D. GONZALES
Criminal District Attorney
Bexar County, Texas

/s/ Andrew N. Warthen
ANDREW N. WARTHEN
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva
San Antonio, Texas 78205
(210) 335-1539
State Bar No. 24079547

Attorneys for the State

/s/ Jorge G. Aristotelidis
JORGE G. ARISTOTELIDIS
Tower Life Building
310 South St. Mary's St.,
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com
State Bar No. 00783557

Attorney for Appellant

Submitted this the 15th day of November, 2019.